

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:   
SOKOLOW, et al, : 04-CV-397  
:   
Plaintiffs, : September 13, 2011  
:   
v. : 500 Pearl Street  
: New York, New York  
PALESTINE LIBERATION ORGANIZATION, et al, :   
:   
Defendants. :   
-----X

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE  
BEFORE THE HONORABLE RONALD L. ELLIS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE CLERK: In the matter of Sokolow, et al v.  
2 Palestine Liberation Organization, et al.

3 Counsel, please state your name for the court.

4 MR. TOLCHIN: Robert Tolchin with the Berkman Law  
5 Office for the plaintiffs.

6 THE COURT: Good morning.

7 MR. HILL: Good morning, Your Honor. Brian Hill and  
8 Mark Rochon from Miller & Chevalier in Washington for the  
9 defendants The Palestine Liberation Organization and The  
10 Palestinian Authority.

11 THE COURT: Good morning. I have a series of three  
12 letters beginning with a September 6<sup>th</sup> letter from the  
13 defendants. Then the September -- I'm sorry, September 12<sup>th</sup>  
14 letter from the plaintiffs. I also have a copy of a letter in  
15 which the defendants sent me the background material which  
16 included the original rule --

17 MR. TOLCHIN: The automatic disclosures, Your Honor.

18 THE COURT: Disclosures, Rule 26 disclosures. I see  
19 that the parties have three issues which they raised, the first  
20 one having to do with disclosure of the contact information for  
21 plaintiffs. The second issue having to do with calculation of  
22 damages, and the third issue having to do with the Rule 35  
23 examinations. As to those three issues, the only one to me  
24 that seems to have need of further exposition from the parties  
25 is the Rule 35.

1           With respect to the Rule 26 disclosures about  
2 information about the plaintiffs, the reason for the Rule 26  
3 disclosures is so that the parties can have the opportunity to  
4 schedule discovery and contact the individuals. I don't see  
5 anything that indicates that the defendants have any problems  
6 contacting the plaintiffs. Obviously implicit in this is the  
7 plaintiffs would be representing that any scheduling or any  
8 contact with the plaintiffs would not cause any delays or any  
9 problems for either the defendants or the court. In some cases  
10 actually it's probably more efficient to contact counsel than  
11 it is to contact the plaintiffs given in some of the cases I  
12 have. Unless there's some practical reason to have the  
13 plaintiff's contact information I don't see that this is going  
14 to be a big issue.

15           MR. TOLCHIN: Your Honor, I would go a step further  
16 and say that they have no business contacting my clients.

17           THE COURT: Given what I've just said, the ball is in  
18 his court. You may not have to say anything more.

19           MR. HILL: Brian Hill for the defendants for the  
20 record. I don't intend to contact Mr. Tolchin's clients. The  
21 reason I want this information is so I can conduct an  
22 investigation of the claims in this case. These plaintiffs are  
23 personal injury plaintiffs. They're making personal injury  
24 claims. I would like to have, and we've agreed to keep it just  
25 in my law firm this information so I can search public

1 databases for background search information. So if I need to  
2 subpoena third parties and have to provide identification  
3 information about which person with the name of the plaintiff I  
4 want the data on I can give them an address. I want the  
5 information so I can do the sort of classic investigation we  
6 would do for a personal injury plaintiff if it's appropriate.

7 I mean, for example, some of the plaintiffs claim to  
8 be permanently disabled. We should be entitled to  
9 hypothetically go interview their neighbors if they say they  
10 can't do yard work and see if they ever mowed their lawn. If  
11 they mowed their lawn which I can't do now because I don't know  
12 if they have a lawn and I don't know where they live. So the  
13 only purpose for getting the information is so that we as  
14 defense counsel can prepare the case for trial.

15 THE COURT: So when you're going to interview their  
16 neighbors will you schedule a deposition so you can take them  
17 then or do their Rule 35 examinations while you're doing that?

18 MR. HILL: I hadn't thought about coordinating that  
19 but if the court is going to require us to do that sort of  
20 thing obviously we can coordinate those sorts of travel. I  
21 imagine there will be travel at some point anyway but that's  
22 the reason we want it. It's not because we intend to engage in  
23 contacts with a represented party.

24 THE COURT: Now you may speak, Counsel.

25 MR. TOLCHIN: Your Honor is a hundred percent correct.

1 We're talking about a Rule 26 automatic disclosure. The  
2 purpose of that is merely to identify the witnesses and tell  
3 the adversary how to serve a subpoena on those witnesses.  
4 There may be other discovery devices. There may be  
5 depositions. There may be other -- the defendants may get  
6 information through other means but we're speaking now about  
7 the automatic disclosures and for my clients knowing that they  
8 can serve a subpoena or a demand or schedule a deposition or  
9 anything else through my office is sufficient for purposes of  
10 the Rule 26 automatic disclosure.

11 I should say also, and I know this is not really a  
12 legal argument, but it seems to be consistent in just about  
13 every case I handle when I have a corporate defendant with  
14 employees, the employees are always listed as care of  
15 defendant's counsel. I get responses like this every day and  
16 it's not a substitute for bringing you a case that says this is  
17 the way it should be but it's what I see all the time.

18 THE COURT: Okay. After the initial disclosures the  
19 care of the attorneys is fine. If you believe that you need  
20 something different and you want to show a particularized need  
21 for it for particular individuals then by all means you can  
22 make application but as it stands now the initial disclosures  
23 are fine.

24 With respect to the question of damages, I'm not sure  
25 the parties actually disagree on the damages. Obviously there

1 are two kinds of damages. There are the subjective kinds of  
2 damages which not only are not susceptible to any particular  
3 kinds of analyses, and even if you get to trial nobody is going  
4 to have any particular road map to them. It is, however,  
5 required that the plaintiffs designate part of the damages are  
6 going to be actual damages so that those can be itemized. As I  
7 understand the plaintiff's position is that they intend to do  
8 that and the real -- the only question left is the timing for  
9 doing that.

10 Did you have -- I know you said that you're pulling  
11 it together. Do you have a time estimate so that we don't have  
12 this with an unspecified date?

13 MR. TOLCHIN: Your Honor, I'll answer that. I just  
14 want to clarify one word you used. You said actual damages. I  
15 suspect you meant economic damages.

16 THE COURT: Economic damages.

17 MR. TOLCHIN: Okay.

18 THE COURT: You suspect correctly.

19 MR. TOLCHIN: Thank you. I'll take what -- give you a  
20 summary of our position one step further. Several of our  
21 clients have looked at the [inaudible] and have come to the  
22 conclusion that proving economic damages may be more trouble  
23 than it's worth because it's relatively small as compared to  
24 witnesses or evidence that they'd have to put together. So we  
25 may actually be withdrawing for at least some of the clients

1 the claims for economic damages. Plainly the main part of this  
2 case is the non economic damages.

3 But your direct question for a time frame and I will  
4 abide by any reasonable time frame that the court thinks is --  
5 would be fair.

6 THE COURT: You know of course by definition anything  
7 I say would be reasonable but I can't make any -- I don't know  
8 what it takes for you to do it so you have to give me some time  
9 frame and in fact I would have expected that you'd give  
10 defendants some time frame so that they could have some idea.  
11 They might agree with you. They know the case better than I  
12 do. So throw something out there, see if it sticks.

13 MR. TOLCHIN: Three weeks, two weeks, three weeks. We  
14 have to reach out to all our clients and --

15 THE COURT: Two, three weeks.

16 MR. HILL: Two weeks is fine. It was due in July and  
17 the case has been around since 2004. So we'd like to get this  
18 as soon as possible. Two weeks is fine.

19 MR. TOLCHIN: That was uncalled for. We're now  
20 agreeing to something else. What was due was served. He had an  
21 issue with it and now we're making it better for him.

22 THE COURT: Well, I'm not -- anything that's said now  
23 in the spirit of cooperation is just sort of bouncing off me.  
24 I mean you're not asking me to make any determinations and if  
25 he says something which may have seemed unfair it's not

1 entering into my determination. If he can live with two weeks  
2 anything else shall we say is dicta.

3 MR. TOLCHIN: Sure.

4 MR. HILL: Two weeks is fine, Your Honor.

5 May I address briefly the issue of the intangible  
6 damages?

7 THE COURT: Yes.

8 MR. HILL: One of the points we made in our letter is  
9 this. We've got a unitary number for intangible damages but  
10 the plaintiff's initial disclosures have a foot note hanging on  
11 it that's got 16 different categories of intangible damages in  
12 three different time frames, past, present and future. May we  
13 have from the plaintiffs some breakdown of that into the  
14 subsidiary categories or time frames because that is -- as it  
15 is now I've got a number of \$20 million for past damages,  
16 future damages, present damages, physical injuries, emotional  
17 injuries, grief, loss of consortium. All that is together in  
18 one big number. Can we have a more detailed calculation?

19 THE COURT: I understand it's all amalgamated and I  
20 don't know how good a lawyer you are but assuming that you had  
21 some breakdown, what could you do with this at a trial?

22 MR. HILL: Well, I --

23 THE COURT: Because if you have these intangible  
24 damages all you're going to do is you're going to lay out what  
25 your past and future and your present -- how much is hurting



1 you. Regardless of what you -- what they say, what's a good --  
2 the jury still gets to decide for themselves.

3 MR. HILL: Well, for example, I might get an expert  
4 witness to opine about the reasonableness of the damages that  
5 are claimed but as it is now it's hard for them to do any  
6 analysis on a unitary figure that has 16 component parts over  
7 three time frames.

8 THE COURT: But even the claiming, I mean are you  
9 suggesting -- maybe I'm mistaken here but unlike the economic  
10 damages which you might do a chart on, what do you expect to  
11 happen at a trial with respect to the intangible damages?  
12 They're going to say --

13 MR. HILL: For example, Your Honor, I mean some of  
14 these are physical injuries and there's several people that  
15 were injured in a variety of different ways but it's impossible  
16 for me to now tell how much of the large number that I've been  
17 given is attributable to the person's physical injury which in  
18 some cases appear to be very severe and in some cases are less  
19 severe but we don't have any of that information now. We just  
20 got a number that includes as well as grief and physical injury  
21 and a bunch of other things.

22 THE COURT: My point is assuming that you get it, how  
23 does this work at a trial? Let us say that plaintiff says \$10  
24 million of the \$20 million is for future pain and suffering and  
25 then what happens at the trial? He doesn't -- that's not the

1 way it's going to be presented at the trial.

2 MR. HILL: Well, I assume the plaintiff is going to be  
3 bound by the disclosures in terms of what they ask for at trial  
4 and this will allow my experts to make determinations about  
5 whether those are reasonable amounts given the type of injuries  
6 that are claimed. Right now I don't have that ability.

7 THE COURT: What is his testimony going to be at trial  
8 that you're going to be addressing?

9 MR. HILL: Well, I don't know what his testimony is  
10 going to be.

11 THE COURT: Right. What are any of these plaintiffs  
12 going to say about their actual intangible damages? I don't  
13 think --

14 MR. HILL: Presumably they're going to testify about  
15 the nature of their injuries.

16 THE COURT: Right, but they're not going to put --  
17 they're not going to say I've been damaged \$10 million for  
18 these things, are they?

19 MR. HILL: I assume so but I assume closing argument  
20 is going to involve counsel putting a number on that and I  
21 would like to have the ability to develop if I can evidence  
22 about the appropriateness of the amounts claimed that I just  
23 lack the ability to do now given the vagueness and combination  
24 of all the categories of damages into this one large category.  
25 That's why I'm asking for the court to require the plaintiffs

1 to -- I recognize that you can't necessarily come up with a  
2 calculation for how much the dollar value of your grief is but  
3 I'd like to know how much of the \$20 million claimed is  
4 attributable to grief as opposed to loss of consortium, as  
5 opposed to physical pain, as opposed to future disability. All  
6 of those claims are together in one number now.

7 THE COURT: And the -- is it your belief that were he  
8 to answer that by putting numbers on it that that would somehow  
9 restrict something at the trial?

10 MR. HILL: Well, I'm assuming that the exclusionary  
11 rule of Rule 37 is going to operate such that whatever is not  
12 disclosed in the initial disclosures is not going to be able to  
13 be utilized by the plaintiffs at trial. So I would like to get  
14 at this point from the plaintiffs a statement of what their  
15 damages are. They have indicated that these are a sum total of  
16 several categories of damages. I would like to know what the  
17 subsidiary parts that make up the total are which I think is  
18 the sort of calculation that Rule 26(a)(1) contemplates being  
19 disclosed.

20 THE COURT: I'm not quite tracking it although this  
21 is -- well, I'm not quite figuring out how this fits in to the  
22 overall discovery as opposed to the initial disclosures but as  
23 for the initial disclosures we'll -- I'll separate it between  
24 intangible and economic, fine. As to the various breakdowns of  
25 the intangibles, without prejudicing you -- well, without

1 prejudice for you to continue to explore that issue and bring  
2 it up to me again, obviously you will be deposing the  
3 individuals, I don't see the efficacy of it in terms of  
4 getting -- I don't see the need for it in the initial  
5 disclosures and frankly I'm not really seeing it in terms of  
6 whether or not under Rule 26 it's going to get you -- lead you  
7 to anything that would be particularly helpful at trial.

8 But I'm willing to concede that you can ask them  
9 questions about it but as to the initial disclosures I'm more  
10 concerned with the difference between economic and intangible.  
11 As to the other intangibles we'll have -- I'm just not seeing  
12 it so for now --

13 MR. HILL: Thank you, Your Honor.

14 THE COURT: -- you've made your argument.

15 MR. HILL: While I'm up may I? I apologize for the --  
16 may I go back to the witnesses just briefly on one issue?

17 THE COURT: Sure.

18 MR. HILL: One of the witnesses that the plaintiffs  
19 have disclosed is neither a plaintiff nor has any affiliation  
20 with the defendant. The plaintiffs have not provided an  
21 address for this individual. We don't have his address and I  
22 would just like to confirm that we're in the Rule 37 world  
23 where if we don't get the address the plaintiffs are not going  
24 to be able to use the witness later. Obviously it wouldn't be  
25 fair to us to not be able to subpoena the person and depose him

1 and then for the plaintiffs to show up with their testimony  
2 later.

3 THE COURT: Okay. Well, you're certainly entitled to  
4 know whether or not they have the address of the individual.  
5 Whether or not that ultimately leads to the preclusion of that  
6 person depends on why they don't have the address or why they  
7 have not provided it.

8 But if you -- if you understand that if you have the  
9 address of anyone you have to give some -- either you have to  
10 say care of counsel or provide the actual address. It may be  
11 that as happens in some cases somebody lists a witness and they  
12 don't know their address for different reasons. But I've had  
13 cases where both sides were trying to find a particular witness  
14 and they listed that witness and everybody was hoping they  
15 would find him. But they're only required to give what they  
16 have so -- who is this witness and what's the story?

17 MR. HILL: Well, according to the plaintiff's list his  
18 name is Musab Hassan Youseff [Ph.] and he is listed as having  
19 knowledge that would go to the liability issues in the case and  
20 if he is in fact going to be a witness at trial we obviously  
21 want to depose him but the only list -- the only information  
22 that's listed about him is San Diego, California and I  
23 obviously can't subpoena him based on that information.

24 THE COURT: Unless he's a very important person in San  
25 Diego. Obviously you are required to give the information or

1 the address if you have it and as I said I've seen cases where  
2 both sides think that if they can find somebody to be a witness  
3 and they -- I've had people saying they've got detectives  
4 looking for people but if you have the address and it turns out  
5 that you didn't give it you haven't honored your obligation  
6 under Rule 26.

7 Do you know this -- you have no better address than  
8 San Diego which I understand is a fairly big city in  
9 California?

10 MR. TOLCHIN: That's correct, Your Honor. The  
11 individual at question as counsel well knows is the son of one  
12 of the individuals who started the Hamas Terrorist  
13 organization. He has since defected his allegiance from his  
14 father, converted to Christianity, moved to the United States.  
15 In the interim he was an intelligence operative for the  
16 Israelis and he's written a book that received some wide press  
17 about his experiences in the Hamas.

18 THE COURT: Do you know any better address than --

19 MR. TOLCHIN: No, no. He's obviously living -- he's  
20 obviously not promulgating his address because I'm sure there's  
21 some people who would like to do him harm. They're also  
22 looking for him. We'd like to find out how to serve a subpoena  
23 on him ourselves. We hope we will figure that out at some  
24 point.

25 THE COURT: The representation is they don't have any

1 better address but they're looking for him.

2 MR. TOLCHIN: He does have a book publisher.

3 THE COURT: Well, either of you are free to find  
4 anybody that you think would have relevant information. Your  
5 obligation under initial disclosures is to the extent that you  
6 have it you give the best information to the other side and  
7 then we'll move on from then.

8 As to the Rule 35 examinations, let's get to the  
9 issue. First of all, I understand about half of the people are  
10 in Israel. What about the other half? Are they at issue in  
11 this -- on the question of where to get their examination?

12 MR. TOLCHIN: Your Honor, before we parse it that way,  
13 coming over here today and going over these materials this  
14 morning, it occurred to me, and I blame myself for not having  
15 thought about this before, but there's a lot of plaintiffs but  
16 not all the plaintiffs are claiming the sorts of injuries that  
17 even give rise to a Rule 35 examination. In other words, there  
18 are some people who were killed and physically injured.  
19 There's some people who claim psychological injury or post  
20 traumatic stress disorder, some kind of pathological treatable  
21 psychiatric condition that's a result of the attack in  
22 question.

23 But there's other people whose claims are limited to  
24 grief and distress but not something we would call a doctor to  
25 prove at trial. So when -- I would have to -- I'm sorry I

1 don't -- I can't tell you an exact number right now but I think  
2 that when we look at it like this the number of people who  
3 actually have to be -- will have to be examined will get a lot  
4 smaller than we were talking about. Somebody's -- if  
5 somebody's family member was killed or injured and he has grief  
6 and distress but he hasn't gone -- it's not the sort of grief  
7 and distress that puts somebody in a -- into psychiatric  
8 treatment or psychological treatment I don't think a Rule 35  
9 examination is in order there. I mean it would -- if  
10 somebody -- you wouldn't call a doctor to prove the case and  
11 you wouldn't call the doctor to refute the case. That would in  
12 effect -- that part of the case would go in just based on the  
13 witness' testimony and the discovery for that is the -- for the  
14 defendant's side would be the deposition.

15 THE COURT: I don't think you can state unequivocally  
16 that if you don't use a psychiatrist somebody wouldn't use one  
17 to rebut what they say.

18 MR. TOLCHIN: Nothing is unequivocal, you're right.  
19 Generally speaking.

20 THE COURT: But in answer to the question that I asked  
21 what about the other half of the people? Is there even an  
22 issue about where they live, any Rule -- you bring up the  
23 question of whether or not there ought to be a Rule 35  
24 examination. That's always going to be an issue. I mean --

25 MR. TOLCHIN: Nineteen of the 42 plaintiffs reside in



1 Israel. One resides in France and --

2 THE COURT: By my quick calculation that leaves 22  
3 that don't fit that description.

4 MR. TOLCHIN: I believe they live in the United --  
5 some place in the United States.

6 THE COURT: Some place?

7 MR. TOLCHIN: Right. Not necessarily in the Southern  
8 District of New York is my point.

9 THE COURT: So is this -- so my question is, is this  
10 dispute only about the ones that are out of the country?

11 MR. TOLCHIN: Well, that's the biggest dispute. I  
12 mean if somebody lives in New Jersey I'll grant you that it's  
13 easy to --

14 THE COURT: Even though it's a foreign jurisdiction.  
15 Okay. All right. We're going to -- if there are issues with  
16 respect to the people who are not outside the continental  
17 United States then you need to make sure that there isn't -- I  
18 mean I don't want to do this piecemeal. That is, as to the  
19 other 22 people if the -- if in this district and if you don't  
20 have a compelling reason for doing it some place then I expect  
21 that you'll make that known to the defendants so that we're --  
22 we don't find out later on that there's somebody who has a  
23 problem. So you do have to ask all of the -- even the ones who  
24 are here but are not if they have any issues. I don't want  
25 any assumptions about whether or not there's going to be any --

1 assuming that -- obviously if the defendants are going to do a  
2 Rule 35 examinations they may agree -- they may decide not to  
3 but I need to know if anybody is going to have a problem with  
4 it.

5 As to the question of those that are out of the  
6 country, and this one I agree in essence with plaintiff's  
7 counsel in this regard, I don't think either side has made --  
8 has particularly briefed the issue, either plaintiffs in the  
9 nature of a protective order or the defendants in terms of  
10 applying the general rule that you're in this district, you  
11 get -- obviously I understand in broad terms what some of the  
12 considerations are but I think this could benefit from a little  
13 bit more exposition from the parties.

14 As I understand it you haven't really scheduled any  
15 exams. You have a fairly generous time for discovery but if we  
16 can do this -- but I also don't see that any additional  
17 submissions are going to be overly extended in terms of time.

18 MR. HILL: Your Honor, if I could just make a couple  
19 of points. I mean we're happy to brief it. Does Your Honor  
20 have a preference on who goes first? I mean technically I  
21 suppose the plaintiffs are asking for relief beyond the usual  
22 rule. I'm happy to have them go first. And could we get a  
23 schedule for doing it would be my other request.

24 THE COURT: You do raise a point about who goes first.  
25 It came to me as an application from you but look, ultimately

1 you're all -- you're going to get a chance because I want to  
2 make sure you all get your say but of course you go first you  
3 get a rebuttal too. So there's certain advantages.

4 MR. HILL: I'm happy to see the advantage to the  
5 plaintiffs as long as we get a date by which the process  
6 starts.

7 THE COURT: How long would it take you to expound on  
8 your position?

9 MR. HILL: I can brief this within a week or two. I'm  
10 just going to give you what I gave you in the letter and a  
11 couple of more cases probably. The real substance of the  
12 response has to come from the plaintiffs in terms of why they  
13 think they can't travel and so forth.

14 THE COURT: I agree with you on that. So why don't we  
15 for the sake of uniformity, why don't we go ahead and make it  
16 two weeks that way you won't be -- and then -- are you going to  
17 have some problems in a response?

18 MR. TOLCHIN: Your Honor, I was just going to ask for  
19 a little more time, the reason being we have -- we have a lot  
20 of other deadlines coming up plus we have a lot of Jewish  
21 holidays coming up.

22 THE COURT: That's why --

23 MR. TOLCHIN: And these exams are certainly not coming  
24 up any time soon because I can't imagine --

25 THE COURT: But he's the one going first. So it's his

1 two weeks.

2 MR. TOLCHIN: Oh, I thought you meant --

3 THE COURT: You have to pay attention here. He's  
4 going first in two weeks. Then I turn to you okay -- that's  
5 why I was saying trying to coordinate because I know you're  
6 trying to do something in two weeks for him. I figured that  
7 way you can -- you won't -- even if he did it in a week you're  
8 still going to be doing stuff. So I figured make it two weeks.  
9 It will give him extra time and by that time you will have  
10 figured out your obligations with respect to the initial  
11 disclosures and then you can turn your attention to this.

12 MR. TOLCHIN: The only request I would have is they  
13 seem long as we stand here. Could I have until the end of  
14 October to respond? We have -- I'll be away for a week on  
15 depositions in another case and we have about ten days of  
16 Jewish holidays in there and there's a lot of plaintiffs to  
17 coordinate with to get these answers. Until they depose the  
18 plaintiffs they're not doing a Rule 35 examination.

19 THE COURT: The short answer is the end of October is  
20 not unreasonable with the proviso that I expect it to be both.  
21 I mean you're not going to get another bite at the apple.

22 MR. TOLCHIN: For sure.

23 THE COURT: You're right, if you're talking about 20  
24 people and there's some correspondence issues I think  
25 ultimately I trust that the defendants would agree that they'd

1 rather have comprehensive answers than something which just  
2 creates more problems. Then they'll get an opportunity to  
3 reply.

4 MR. HILL: Within the normal time would be fine for  
5 our reply.

6 THE COURT: Two days.

7 MR. HILL: Two days for normal time?

8 THE COURT: No.

9 MR. TOLCHIN: For discovery of motion.

10 MR. HILL: A week would be great.

11 THE COURT: A week is fine. It could have been normal  
12 for me. You don't know -- you say normal but a week is fine.  
13 So sometime mid November. To put actual dates on it it would  
14 be September 27<sup>th</sup>, October 28 and then November 4<sup>th</sup>.

15 MR. HILL: Your Honor, while I'm up and at the risk of  
16 going back to an issue again, something Mr. Tolchin just said  
17 is a little distressing and it has to do with the nature of the  
18 damages the plaintiffs are claiming. As Your Honor will recall  
19 he said some of them are not claiming a psychological injury.  
20 He wrote me a letter on August 14<sup>th</sup> where he said all the  
21 plaintiffs are claiming damages for emotional and mental pain,  
22 grief, anguish and distress and psychological injury, trauma  
23 and disabilities. Respectfully, and I know Your Honor has  
24 already ruled, but this really just point out why I need the  
25 detailed breakdown of the intangible damages because apparently

1 even though Mr. Tolchin told me in mid August that some of  
2 these folks are claiming these injuries, based upon the basis  
3 on which I decided I needed to Rule 35 exams he's now  
4 suggesting that maybe they are. So again I just point out why  
5 we need this information.

6 THE COURT: Well --

7 MR. HILL: It would have avoided this whole  
8 miscommunication about who needs an exam.

9 THE COURT: I assume that his representation was that  
10 to the extent that some of the people are going to pull back on  
11 that representation that will benefit everyone. Once he's made  
12 that representation -- if he says some people have decided that  
13 it's not worth the trouble to claim certain kinds of damages if  
14 he's going to say -- I assume that part of what he's going to  
15 do is he's going to indicate whether or not the individuals  
16 have been seeing a professional or they're just going to be  
17 claiming run of the mill psychological damages then that will  
18 be helpful in all of us in determining what needs to be done  
19 with respect to those particular plaintiffs.

20 As I stated to him, regardless of whether or not  
21 they're going to be run of the mill that doesn't subscribe what  
22 you get to do about it.

23 As to the breakdown, when you see what he's produced  
24 and when it's all sorted out, as I said, you can still make  
25 further application but as to the initial disclosures we stand

1 where I stood in the beginning.

2 MR. HILL: Thank you, Your Honor. May I -- if we're  
3 done with the Rule 35 issue, two other minor items that we  
4 discussed in preparation for today. I've discussed it with Mr.  
5 Tolchin but not yet with the court.

6 One of them is we appear to be in agreement that we  
7 need some sort of confidentiality order to cover material  
8 that's going to be produced in the case. We're, however, for  
9 whatever reason having trouble agreeing on one. I proposed one  
10 to the plaintiffs on July 1<sup>st</sup> and while I had heard back from  
11 Mr. Tolchin that it's not acceptable I haven't gotten a  
12 counterproposal and I haven't got a redline and I just ask the  
13 court to maybe set us on a schedule so we can either agree on a  
14 confidentiality order or submit a dispute to Your Honor so that  
15 this issue doesn't linger and delay production from parties or  
16 non parties.

17 THE COURT: How much time do you think you -- July 1<sup>st</sup>  
18 is a long time.

19 MR. TOLCHIN: Your Honor, we responded. The order  
20 they proposed sought to make confidential materials  
21 confidential even at trial which is just absurd. It doesn't  
22 work that way because trials are public.

23 THE COURT: But you said you responded?

24 MR. TOLCHIN: We told him it's not acceptable. We had  
25 a problem -- we've had other cases --

1 THE COURT: When you say it's not acceptable, did you  
2 have a counterproposal or you just said it's not acceptable?  
3 I'm not sure.

4 MR. TOLCHIN: We --

5 THE COURT: Did you redline it?

6 MR. TOLCHIN: We did not redline it because it's  
7 overall -- it's a non starter. We have -- they have a  
8 [inaudible] for making an onerous lengthy involved complicated  
9 confidentiality order that it's just not a place to start.  
10 What would be a place to start would be, for example, Judge  
11 Rakoff's has posted on his -- with his individual rules a  
12 proposed confidentiality order, a model confidentiality order,  
13 simple, standard. The particular concerns that we have  
14 obviously whatever comes out -- when it comes to trial  
15 confidentiality is off. Whatever you put in evidence becomes  
16 public.

17 The problem we've had in the past is they seem to  
18 want to designate everything they produce as confidential and  
19 obviously by using the word everything I'm exaggerating but  
20 great deals of material. Then they seem to want us to -- if we  
21 don't want it to be confidential they want to put the burden on  
22 us to prove why every piece of paper shouldn't be confidential  
23 and the procedure that we would prefer and I think is a lot  
24 more reasonable, particularly considering that these cases --  
25 that this case has -- is a very -- is a case of serious public



1 interest. If they want to designate something as confidential  
2 fine but if we -- if we send them a letter saying we question  
3 this designation the burden of proof should shift to them to  
4 show us why it's confidential or to seek a ruling from the  
5 court.

6 THE COURT: Even granting everything that you just  
7 said that doesn't answer the question about procedurally why  
8 you have -- why you don't have a confidentiality agreement or  
9 if somebody hasn't made an application to me. If you have a  
10 proposal to -- a counterproposal you send it to them or you  
11 tell them what it is and if you disagree then you want to make  
12 an application to me. If you have competing confidentiality  
13 agreements you submit it to me and I'll decide which one if any  
14 with or without modification seems appropriate but -- you have  
15 to make some progress. It can't be just what you've done is  
16 unacceptable.

17 MR. TOLCHIN: My general perspective is I don't like  
18 confidentiality orders. I think they're abused. I think  
19 they're used way too much and you wind up with things being  
20 designated confidential that aren't in the slightest  
21 confidential but then creates a headache every time you file a  
22 motion with an exhibit. You have to file it under seal.

23 THE COURT: That's great. You can tell it to your  
24 class when you talk about procedures in federal court but  
25 they -- if you cannot agree then it's up to the court to

1 determine whether or not it's appropriate and what the nature  
2 of the confidentiality agreement will be.

3           So if your position is that you don't think there  
4 should be any and they think there should and they can submit  
5 what they want. If you have a counterproposal I'll deal with  
6 that also but I don't disagree with you that confidentiality  
7 agreements create a lot of problems but they also prevent a lot  
8 of problems and they get cases moving. There are things that  
9 happen with confidentiality agreements which wouldn't happen in  
10 the absence of them. If you think they're being overly used or  
11 if you think somebody is over designating, most of the  
12 confidentiality agreements have a provision for that. Work  
13 this out.

14           I understand that you have things to do in the next  
15 couple of weeks but I don't see why this should take more than  
16 three weeks. You talk it over. If you can't come up with an  
17 agreement you can -- the defendants can present it to me as a  
18 request for a protective order or you can agree on procedure  
19 where you submit competing -- you can agree on much of it and  
20 submit to me what you disagree with on. It's really up to you  
21 how you want to do it. It does seem to me that -- it seems  
22 rather --

23           On the one hand you as plaintiff's counsel are saying  
24 that you think confidentiality agreements are over used but  
25 almost everything that we've discussed today had to do with you

1 keeping stuff confidential. So you can reconcile those notions  
2 but it seems to me that implicit in the discussions that we've  
3 had today is that either one side or the other is going to want  
4 something in this case not to be broadcast and made public  
5 because of whether or not you think it's security or whatever  
6 or somebody thinks it is. So if you don't have a  
7 confidentiality agreement in place I don't know how you're  
8 going to deal with that, whether it's documents or names or  
9 people or addresses. You have to have some way to deal with  
10 it.

11 So I'd say you have three weeks. It's now September  
12 13<sup>th</sup>. If you're not able to agree by October 7<sup>th</sup> then -- well,  
13 if you're not able to agree in three weeks which is October 5<sup>th</sup>  
14 I want you to give me by October 7<sup>th</sup> how you want to present it  
15 to me. That can be -- you can each submit to me what you think  
16 is an appropriate confidentiality order. One side could submit  
17 and the other side could object. Whatever way you want to  
18 present it but it seems to me that if one thing has become  
19 clear is that there's information, documents and otherwise that  
20 it seems clear somebody is going to want not to have on Page 6  
21 in the newspaper.

22 MR. HILL: Thank you, Your Honor. One more item if I  
23 may.

24 THE COURT: Yes.

25 MR. HILL: One of the plaintiffs according to the

1 initial disclosures has some information about the identity of  
2 her assailants. This is Ms. Varda, V-A-R-D-A, Guetta, G-U-E-T-  
3 T-A. It's on Page 3 of the initial disclosures. It indicates  
4 that she has knowledge regarding identity of the gunman. As  
5 Your Honor knows from our prior discussions, we're not ready at  
6 this point to take a deposition of Ms. Guetta about the damages  
7 she sustained or her son who was injured in this attack  
8 sustained. However, we would like to as soon as possible take  
9 a deposition of her to learn what information she has about  
10 liability in case that engenders subsequent discovery that may  
11 be overseas and so forth.

12 So I've had a discussion with Mr. Tolchin about  
13 potentially bifurcating her deposition. We're willing to limit  
14 the total examination to the seven hours but what we'd like to  
15 do is in the relatively near future take a deposition of her on  
16 the liability issues and reserve the right to come back later  
17 after the damages discovery has all been produced and so forth.

18 THE COURT: Is she local? Is there no issues about --

19 MR. HILL: I don't know, Your Honor. I don't have the  
20 address.

21 MR. TOLCHIN: I don't believe so, Your Honor.

22 THE COURT: You don't believe so?

23 MR. TOLCHIN: I didn't realize he was going to raise  
24 this issue here and I have to -- I didn't memorize the  
25 addresses. I could make a phone call and check if that would

1 help you but I can't -- I don't want to make a representation  
2 that's erroneous.

3 THE COURT: Well, do you have any problem with the  
4 principal of having her deposition bifurcated?

5 MR. TOLCHIN: If she were here in New York, no. If  
6 she's in Israel and we all have to fly over there and hire  
7 court reporters and hotels and airplanes --

8 THE COURT: Before you continue, I mean I'm not sure  
9 you've discussed this. Are you saying that with respect to  
10 even this part of it you'd want to have her in person?

11 MR. HILL: Well --

12 THE COURT: Or you haven't made that determination  
13 yet?

14 MR. HILL: I think I might want to have it in person  
15 just based on what Mr. Tolcher has told me about the nature of  
16 that identification. Mr. Tolcher has suggested that maybe she  
17 has identified a photograph of the assailant. So I just want  
18 to conduct this examination so I can find out what her  
19 testimony is going to be and find out if I need to do any  
20 additional discovery but I don't want to wait until we've got  
21 all the damages material and done the Rule 35 exam toward the  
22 end of the case.

23 THE COURT: It sounds as if there's still a number of  
24 uncertainties at this point. We don't know the -- it's hard to  
25 do a balancing when I don't know what else is going on the

1 scale. This is probably not --

2 MR. TOLCHIN: Maybe a specific interrogatory. We give  
3 them what she knows and maybe that will help them.

4 THE COURT: Why don't you discuss -- have a further  
5 discussion about all of the issues of what she knows, how she  
6 knows it, how she did the identification, where she is, what it  
7 would take, can it be done, a video, whatever, any number of  
8 different issues and what you -- when you have all of that in  
9 your minds and you think you've reached an impasse then you can  
10 present your arguments to me. I'll decide under the rules  
11 balancing everything which seems to make sense. It depends on  
12 the answers to some of those questions.

13 MR. HILL: I only raised it today because we're with  
14 Your Honor and I know it will ultimately take an order just  
15 trying to cut through if it was possible. I understand you'd  
16 like to --

17 THE COURT: Okay. All right. We will -- I know we  
18 have a very long discovery date although what I'm going to do  
19 is I'm going to tentatively put you down for a conference in  
20 November. Unfortunately this will also require me to have my  
21 law clerk call you. So that we don't leave it totally without  
22 a date I'm going to give you a date which may be subject to  
23 change and that will be November 17<sup>th</sup> at ten a.m. That way at  
24 least you will put it on your calendar and if we have to change  
25 it -- I don't like people leaving without a date even if the

1 date might change because the triggering mechanism for anybody  
2 to do anything is to see a date on their calendar. I'm just  
3 like you in that regard.

4 Other than that, with respect to this last witness I  
5 expect that if you do reach an impasse and you need to discuss  
6 it you don't have to wait until when we have a conference. You  
7 can have -- you can contact my law clerk and we'll talk about  
8 it on the phone so that we don't have to have any unnecessary  
9 delays.

10 Other than that we'll be adjourned for now.

11 MR. TOLCHIN: Thank you, Your Honor.

12 MR. HILL: Thank you, Your Honor.

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1 I certify that the foregoing is a court transcript from an  
2 electronic sound recording of the proceedings in the above-  
3 entitled matter.

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6 Shari Riemer

7 Dated: September 19, 2011  
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